Supreme Court, U.S.
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No. 96-947

In The

Supreme Court of the United States

October Term, 1996

JODY H. DERAMUS,

Petitioner,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICUS CURIAE STATE OF MISSISSIPPI IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

The State of Mississippi, through its Attorney General, Mike Moore, respectfully submits this *amicus curiae* brief in the above styled matter pursuant to Rule 37.4 of the Supreme Court Rules. The Office of the Attorney General, created by Article 6, Section 173 of the Mississippi Constitution of 1890, is entrusted with management of all legal affairs of the state including the authority to manage and control all litigation necessary for enforcement of state laws and protection of public rights. *Kennington-Saenger Theaters v. State*, 18 So.2d 483, 486 (Miss. 1944). The public policy issues raised in this matter are of paramount importance to the public health and safety of the citizens of Mississippi. The federalism issues raised by this case, as underscored by an apparent split in the circuit courts of appeal, require this Court to give definitive guidance with regard to the appropriate use of certification procedures.

JUSTIFICATION FOR GRANTING THE WRIT

The Compelling State Interest

The control, treatment, and prevention of communicable diseases is of paramount importance to the several states. Of the numerous communicable diseases that afflict the citizens of this country, none are more insidious, deadly, or costly than the human immunodeficiency virus (hereinafter referred to as "HIV"). Clinical manifestation of disease as a result of HIV occurs when one or more opportunistic diseases occur in the presence of the

virus, referred to as acquired immunodeficiency syndrome (hereafter referred to as "AIDS").

Mississippi is a very rural state. A little more than half of Mississippi's counties have a population of 25,000 or less, with only 10 of its counties having a population greater than 60,000. Mississippi has four standard metropolitan statistical areas which include seven of its 82 counties. Statistics reveal that over 52% of the state's population live in rural areas. All of Mississippi's 82 counties, or parts thereof, are medically underserved, and 54 of the 82 counties are designated as health professional shortage areas.

As compared to many other states, Mississippi's citizens are poor, under-educated, under-employed, and relatively unhealthy. While there are no definitive explanations for these conditions, it is reasonable to surmise that none exist independently of the others, and that comprehensive social, economic and health programs are needed to correct them.

The conservative, religious nature of Mississippians compounds other environmental difficulties in that discussions of HIV infection and AIDS are rarely conducted in frank, open forums. Scientifically verified interventions are often prohibited because they appear to give implicit permission to the behaviors they seek to modify or in which they attempt to reduce the level of harm.

Obviously, all this means that HIV infection and AIDS are even more difficult issues to address in Mississippi than in other states. It is of paramount importance that all persons with diagnostic information regarding a

communicable disease report such information to the State Department of Health.[1]

Statutes and Regulations Requiring Reporting

The state has enacted legislative and regulatory reporting requirements in an effort to ensure that certain communicable diseases are reported. Despite the efforts of the state legislature and the State Board of Health, problems continue to exist with the reporting of communicable disease, particularly where out-of-state laboratories are involved. The sufficiency of state statutes and regulations mandating reporting should be determined by the Mississippi Supreme Court, the only court constitutionally empowered to do so. Moreover, the far-reaching determination of whether or not an insurance company, or any other person with knowledge of a communicable disease, has a duty to report such information to an affected citizen of Mississippi should be determined by the Mississippi Supreme Court.

Miss. Code Ann. § 41-23-1(1) (1972) charges the State Board of Health with the duty to promulgate rules and regulations defining and classifying communicable diseases and other diseases that are a danger to health and

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[1] The intervention process initiated by the Department of Health is detailed, exhaustive, and tailored to the specific disease in question. At the risk of over-simplification, the Department's intervention programs are designed to prevent the spread of communicable disease through diagnosis, treatment and education. In the case *sub judice*, the Petitioner would have been contacted by Department staff as a routine part of the intervention process.

to provide for a procedure for reporting, monitoring and prevention of such diseases. Subsection (4) of the same section charges every practicing or licensed physician, or person in charge of a hospital, health care facility or laboratory, with the responsibility of reporting immediately to the State Board of Health every case of a reportable communicable disease.

The importance of reporting communicable diseases is underscored by *Miss. Code Ann. § 41-23-1(6) (1972)* wherein a physician who breaches his duty to report is subject to suspension of his license to practice medicine. Moreover, *Miss. Code Ann. § 41-23-1(7) (1972)* makes the failure to report a communicable disease a crime subject to a monetary fine and confinement in the county jail. *Miss. Code Ann. § 41-23-1(9) (1972)* requires that persons who receive notification of the infectious condition of an individual hold such information in the strictest of confidence and privilege and not reveal the information to others, and take only those actions necessary to protect the health of the infected person or other persons where there is a foreseeable, real, or probable risk of transmission of the disease.

Pursuant to the aforementioned code sections, the Mississippi State Board of Health has adopted its *Rules and Regulations Governing Reportable Diseases* (hereafter referred to as the "Regulation"). Section I of the 1985 version of the Regulation, in effect at the time Mr. Deramus made application to Jackson National Life, provided in part as follows:

> Each physician, including each pathologist, dentist, and nurse, as well as the superintendent, administrator, or other person in charge of any

> hospital, institution, school or day care center shall report to the State Department of Health any case or suspected case of communicable or reportable disease, including those hereinafter listed, which he is attending, has examined, or of which he has knowledge. Such report shall include, unless otherwise specified, the patient's name, address, age, race, sex, the disease or suspected disease and the date of onset of the disease.

Acquired Immunodeficiency Syndrome (AIDS) was included among the diseases of public health importance to be reported. Section V of the Regulation provided in part as follows:

> It shall be the duty of the director or any other person in charge of any clinical laboratory in the State of Mississippi to notify the Mississippi State Department of Health, Jackson, by forwarding within 24 hours a copy of any laboratory report which is considered diagnostic of **or indicative of the diagnosis of a reportable disease** . . . (emphasis added).

In order to prevent communicable diseases the appropriate state agency, which in Mississippi is the State Department of Health, must have access to information regarding diagnosis of such disease. Moreover, it is necessary that persons infected with a communicable disease be apprised of his condition to minimize the possibility of infecting persons with whom he comes in contact. Toward this end, the State Board of Health promulgated and has revised the Regulation several times in an attempt to ensure that all health care providers, or other persons with diagnostic information, report such information.

Because of the compelling state interest in adequate, timely reporting of information regarding communicable diseases, any questions arising regarding the interpretation of state statutes or regulations promulgated pursuant to those statutes should be decided by the Mississippi Supreme Court. Likewise, because of the grave impact on the citizens of the state, the application of tort law to facts surrounding the failure to report information regarding communicable diseases, should be decided ultimately by the Mississippi Supreme Court. It is simply inappropriate for a federal court, sitting as a result of jurisdiction based on diversity, to decide public policy matters of such importance.

The Fifth Circuit Did Not Comply With *Erie* Requirements

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1935) the Supreme Court recognized that "[t]here is no federal general common law." *Id.* at 78. *Erie* requires federal courts sitting in diversity to follow the law laid down by the respective state courts, so long as those precedents are constitutional, consistent with statutory provisions, and do not interfere with the power granted to federal courts.[2] *Erie*, when read with *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874), ensures that the decisions of state

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[2] *See also* 28 U.S.C. Section 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply").

courts will be respected by federal courts sitting in diversity.[3]

Despite the possibility of making an incorrect "*Erie*-guess" on a matter of compelling importance to the State of Mississippi and to its individual citizens, the Fifth Circuit simply affirmed, without comment, the findings of the district court. In so doing, the Fifth Circuit violated two principles set down by this Court. This Court has long encouraged the use of certification procedures to resolve unsettled state law questions. *See, e.g., Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960). The court of appeals also failed to follow this Court's requirement for a *de novo* review of the trial court's findings.

Under Mississippi rules, the Fifth Circuit could have certified the question to the Mississippi Supreme Court. *See Mississippi R. App. Proc. 20.* Without explanation, however, the circuit court of appeals simply entered a PER CURIAM order affirming the judgment of the district court "on the basis of the district court's Memorandum Opinion and Order attached hereto."

The public policy and individual rights decided by the federal courts in this matter are too important for an "*Erie*-guess." Unsettled questions of state law, particularly those involving important public policy issues, should be decided by the appropriate state court. In this case, the Mississippi State Supreme Court is the only court with the constitutional jurisdiction to make the call. *See, e.g., Lehman Brothers v. Schein*, 416 U.S. 386, 391

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[3] In *Murdock*, this Court suggested that it would not concern itself with revisiting issues of state law.

(1974); *See also Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 814 (1976) (discussing abstention by federal courts, "in a case and in similar cases [which would] be disruptive to state efforts to establish a coherent policy with respect to a matter of substantial public concern.").

This Court stated in *Lehman Brothers*, 416 U.S. at 391, that certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." See also *Belloti v. Baird*, 428 U.S. 132 (1976). The vast majority of states, like Mississippi, have procedures for the certification, from federal courts, of questions of unsettled law.

Several circuits appear to have embraced this Court's instruction. In *Toner v. Lederle Laboratories*, 779 F.2d 1429 (9th Cir. 1986), the Ninth Circuit recognized that "[c]ertification provides a means to obtain authoritative answers to unclear questions of state law." *Id.* at 1432, citing 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 520 (1978). The Eleventh Circuit noted in *Mosher v. Speedstar Div. Of AMCA Intern., Inc.*, 52 F.3d 913 (1995) that:

> . . . [Certification] is a useful adjudication tool. Only through certification can federal courts get definitive answers to unsettled state law questions. Only a state supreme court can provide what we can be assured are "correct" answers to state law questions, because a state's highest court is the one true and final arbiter of state law. From our perspective, state law is what the state supreme court says it is, and a state supreme court's pronouncements are binding on every state and federal judge.

Id. at 917, citing *Sultenfuss v. Snow*, 35 F.3d 1494, 1504 (11th Cir. 1994) (en banc) (Carnes, J., dissenting), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1254, 131 L.Ed.2d 134 (1995).

In light of earlier decisions by the Fifth Circuit embracing the use of certification procedures, the failure to rely on the Mississippi Supreme Court to resolve this unsettled question is inexplicable. *See, e.g., Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704 (5th Cir. 1975); and *Walters v. Inexco Oil Co.*, 670 F.2d 476 (5th Cir. 1982). The outcome of this case is too important to be decided by an "*Erie*-guess". In a matter of such grave public policy importance, principles of cooperative federalism demand that the unsettled questions undergirding this controversy be decided by the only court with the constitutional wherewithal to do so, the Mississippi Supreme Court.

The Fifth Circuit Did Not Comply With *Salve Regina* Requirements

On appeal of the trial court's disposition of this case, the Fifth Circuit panel affirmed by simply holding "[t]he judgment of the district court is affirmed on the basis of the district court's Memorandum Opinion and Order attached hereto." This Court concluded in *Salve Regina College v. Russell*, 499 U.S. 225 (1991) that "a court of appeals should review *de novo* a district court's determination of state law." *Id.* at 231. The principles of the *Erie* doctrine, "the discouragement of forum-shopping and avoidance of inequitable administration of the laws" are advanced by independent appellate review. *Id.* at 234,

citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Concluding the holding in *Salve Regina*, this Court stated, "[t]he obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeal review the state-law determinations of the district courts *de novo*." *Id.* at 239. The affirmance of the district court's determination fails to comply with this Court's charge.

CONCLUSION

The State of Mississippi has a compelling interest in the public policy issues at stake in this case. Likewise, important private rights of its citizens are at issue. The unsettled law at the heart of this case should have been certified to the Mississippi Supreme Court. By utilizing the certification procedure provided for by the *Mississippi Rules of Appellate Procedure*, the Fifth Circuit could have avoided the possibility of affirming an incorrect "*Erie*-guess" by the district court. Moreover, the Fifth Circuit failed to follow the requirements for appellate review laid

down by this Court in *Salve Regina*. Based on the foregoing, the State of Mississippi urges that the lynchpin questions underlying this controversy be decided by the Supreme Court of Mississippi.

Respectfully submitted,

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